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In the Supreme Court of the United States

OCTOBER TERM, 1989

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE TREASURY, OFFICE OF CHIEF COUNSEL AND NATIONAL TREASURY EMPLOYEES UNION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Title VII of the Civil Service Reform Act of 1978 (CSRA) confers upon all excepted service employees the right to challenge disciplinary actions through the grievance arbitration procedure in their collective bargaining agreement. The question presented here is whether—under *United States* v. *Fausto*, 108 S. Ct. 668 (1988)—Congress's withholding of Title II appeal rights to the Merit Systems Protection Board concerning disciplinary actions for excepted service employees who do not have veterans preference is sufficient, without more, to compel the implied repeal of the Title VII grievance arbitration remedy which Congress also enacted as part of the comprehensive CSRA scheme.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Federal Labor Relations Authority petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.[1]

OPINIONS BELOW

The judgment of the court of appeals (App., *infra*, 1a-14a), including a supplemental opinion (App., *infra*, 16a-17a), granting the federal agency employer's petition for review and denying the Authority's application for enforcement of a decision and order

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[1] The National Treasury Employees Union ("NTEU"), a party intervenor on behalf of the Authority in the proceedings below, has previously petitioned the Court for a writ of certiorari with respect to the lower court's judgment here at issue. *NTEU* v. *United States Department of the Treasury, et al.*, petition for cert. pending, No. 89-610.

of the Authority, is reported at 873 F.2d 1473. The decision and order of the Federal Labor Relations Authority (App., *infra*, 19a-36a) is reported at 30 F.L.R.A. 656 (1987).

JURISDICTION

The judgment of the court of appeals (App., *infra*, 1a-14a) was entered on May 2, 1989. A petition for rehearing was denied on July 17, 1989 (App., *infra*, 15a), and a supplemental opinion was filed that day (App., *infra*, 16a-17a). On October 5, 1989, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of the Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. 7101-7135 (1988), and Title II of the Civil Service Reform Act of 1978, as amended, 5 U.S.C. 4303 and 7511-7513 (1988), are reproduced in the appendix (App., *infra*, 49a-66a).

STATEMENT

1. This case involves the interpretation of various provisions from two different parts of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) ("CSRA"), to determine whether the provisions in one part impliedly negate the clear effect of provisions in the other. The CSRA is a comprehensive overhaul of the federal civil service system. *Lindahl* v. *OPM*, 470 U.S. 768, 773 (1985). At issue are Title VII of the CSRA, also referred to as the Federal Service Labor-Management Relations Statute ("the Statute" or "Title VII"), which governs labor-management relations in the federal serv-

ice[2]; and Title II which, among other things, provides procedures for challenging certain disciplinary actions taken against federal employees. The specific question before the Court is whether Congress's withholding of appeal rights regarding disciplinary actions for a certain class of federal excepted service employees in Title II of the CSRA should be construed to negate by implication the right to challenge such matters through the negotiated grievance and arbitration procedures concededly granted these employees in Title VII of the CSRA.

a. Under the Statute, the responsibilities of the Federal Labor Relations Authority ("the Authority") include adjudicating unfair labor practice complaints, negotiability disputes, bargaining unit and representation election matters, resolving exceptions to arbitration awards and generally providing guidance and leadership with respect to the federal sector labor relations program. See 5 U.S.C. 7105(a)(1), (2); see also *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 93 (1983). The Authority may petition for enforcement of its orders in appropriate United States courts of appeals. 5 U.S.C. 7123(b). Persons, including federal agencies, who are aggrieved by certain types of Authority orders

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[2] The Statute is codified at 5 U.S.C. 7101-7135. Prior to the enactment of the Statute, labor-management relations in the federal service were governed by a program established in 1962 by Executive Order No. 10,988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos. 11,616, 11,636, and 11,838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.). The relevant sections of Title II of the CSRA are codified at 5 U.S.C. 4303, 7511-7513, and 7701-7703.

may seek judicial review in the courts of appeals. 5 U.S.C. 7123(a).

Congress specified in the Statute that "labor organizations and collective bargaining are in the public interest." 5 U.S.C. 7101(a). Consistent with this finding of Congress, the Statute requires an agency to accord exclusive recognition to a labor organization selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election. 5 U.S.C. 7111(a). A labor organization accorded such exclusive recognition has an obligation to represent fairly "all employees in the unit" regardless of whether they are union members. 5 U.S.C. 7114 (a)(1). An "employee" is, with exceptions not relevant here, defined as *any* individual employed by an Executive agency. 5 U.S.C. 7103(a)(2). The Statute makes no distinctions between individuals employed in the competitive service or the excepted service. See pages 5 to 6, *infra*.[3] The agency and the labor organization certified as exclusive representative have a duty to meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement. 5 U.S.C. 7114(a)(4). The duty to bargain in good faith extends to matters relating to conditions of employment affecting bargaining unit employees. 5 U.S.C. 7103(a)(12) and 7117. Further, Congress specifically provided that any collective bargaining agreements negotiated under the Statute must provide for a negotiated grievance procedure, including a provision for binding arbitration

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[3] Certain employees who otherwise meet the Statute's definition of employee are excluded from collective bargaining units (*e.g.*, confidential employees, employees engaged in personnel work, certain investigators and auditors). 5 U.S.C. 7112(b)(1)-(7).

of unresolved disputes. 5 U.S.C. 7121(a)(1), (2). The Statute defines "grievance" broadly and excludes only five specific topics from its scope, none of which directly concerns excepted service employees. 5 U.S.C. 7121(c).

b. Title II of the CSRA provides procedures to be used when employer agencies impose discipline, such as suspensions and removals from the service, on their employees. These procedures include, under certain circumstances, administrative and judicial review of such actions. Unlike the collective bargaining rights found in Title VII which apply equally to all employees under its coverage, the availability of the procedural protections of Title II vary depending upon the employee's status.

In that regard, positions in the federal service consist of competitive service positions unless the positions have been excepted, as set forth in 5 U.S.C. 2102 and 2103. See *NTEU* v. *Horner*, 854 F.2d 490, 492 (D.C. Cir. 1988). The competitive service generally includes those positions for which examinations are given. 5 U.S.C. 3304. The employees involved in this case, attorneys in the Internal Revenue Service's (IRS's) Office of Chief Counsel, are only one of the many kinds of employees in the excepted service who encumber positions for which it was deemed impracticable to hold any examinations when they were hired. See 5 C.F.R. Pt. 213.

Moreover, among excepted service employees, some are "preference eligible" because they are military veterans or under certain circumstances relatives of veterans. See 5 U.S.C. 2108(3). Employees in the competitive service, as well as "preference eligible" excepted service employees, are entitled to the appeal rights for certain disciplinary actions (such as removals, reductions in grade or pay and suspensions

of 14 days or more) under Title II of the CSRA, whereas "nonpreference eligible" excepted service employees are not. See 5 U.S.C. 4303(e) and 7511(a).[4]

2. During contract negotiations between IRS's Office of Chief Counsel and NTEU, the parties agreed to a negotiated grievance procedure which would allow bargaining unit employees to grieve and arbitrate, among other things, such disciplinary actions

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[4] Title II of the CSRA provides procedures for actions taken for unacceptable performance ("Chapter 43 actions"), see 5 U.S.C. 4301-4303; and those taken for "such cause as will promote the efficiency of the service" ("Chapter 75 actions"), see 5 U.S.C. 7501-7514. With respect to Chapter 43 actions, all employees are provided certain procedural protections, such as advance notice of the proposed action, an opportunity to respond to the notice, and a written decision specifying the instances of unacceptable performance. See 5 U.S.C. 4303(a)-(d). However, with respect to an employee's appeal rights from such a personnel action based on unacceptable performance, competitive service and preference eligible employees in the excepted service are granted the right to appeal such a personnel action directly to the Merit Systems Protection Board ("MSPB"), whereas nonpreference eligible employees in the excepted service are generally not granted that right. 5 U.S.C. 4303(e). See *Harrison* v. *Bowen*, 815 F.2d 1505, 1512 (D.C. Cir. 1987).

With regard to Chapter 75 actions, only non-probationary competitive service and preference eligible excepted service employees are entitled to procedural protections analogous to those available in Chapter 43 actions. See 5 U.S.C. 7501(a)(1) and 7513. Other excepted service employees (*i.e.*, those who are not preference eligible) are not conferred these protections by statute. However, under 5 U.S.C. 7511(c), the Office of Personnel Management ("OPM") is given the authority to extend these protections, including the right to appeal to MSPB, to excepted service employees who are not preference eligible. OPM has not done so for attorneys in Schedule A of the excepted service, such as those affected by this case. See 5 C.F.R. Pt. 213-Excepted Service.

as removals, reductions in grade or pay, suspensions for more than 14 days and furloughs of 30 days or less (App., *infra*, 19a). As provided for by section 7114(c) of the Statute, the contract was submitted to the Department of Treasury for agency head approval (App., *infra*, 19a). The agency head disapproved the contract based on the contention that the agreement's negotiated grievance procedure was invalid because it did not specifically preclude the bargaining unit's excepted service employees from using the negotiated grievance procedure to challenge disciplinary actions (App., *infra*, 20a). The union appealed the agency's disapproval to the Authority and the Authority reversed that disapproval, finding that no provision of law or regulation precludes excepted service employees in the bargaining unit from grieving disciplinary actions under the scope of the negotiated grievance procedure which Congress authorized in the Statute (App., *infra*, 21a).

The Authority began its decision in this case by noting that in *National Treasury Employees Union and Department of Health and Human Services, Region V, Chicago, Illinois*, 25 F.L.R.A. 1110 (1987) (*HHS, Region V*) (App., *infra*, 37a-48a) (subsequently reversed *sub nom. Department of Health and Human Services* v. *FLRA*, 858 F.2d 1278 (7th Cir. 1988)), it found negotiable a proposal to the same effect as the provision at issue in this case (App., *infra*, 21a). Moreover, the Authority stated that in *HHS, Region* V it had considered the same arguments as those advanced by the agency in this case (App., *infra*, 21a). The Authority concluded that nothing in the record in the instant case warranted a conclusion contrary to that found in *HHS, Region V* (App., *infra*, 21a).

In *HHS, Region V*, the Authority first found nothing in the express language of the Statute which would exclude excepted service employees from the full coverage of the grievance procedures mandated by the Statute (App., *infra*, 42a-44a). Further, in *HHS, Region V*, the Authority rejected the employer agency's argument that since Congress did not provide nonpreference eligible excepted service employees with the right to appeal disciplinary actions to the Merit Systems Protection Board, it follows that Congress did not intend that these employees could challenge such actions through the negotiated grievance and arbitration procedures (App., *infra*, 44a). The agency employer there had relied on *Department of Justice* v. *FLRA*, 709 F.2d 724 (D.C. Cir. 1983), where the court held that probationary employees, who are denied statutory appeal rights of their terminations, cannot appeal them through the grievance and arbitration procedure (App., *infra*, 44a).

To the contrary, the Authority found in *HHS, Region V* that, unlike the situation involving probationary employees, there is nothing in the Statute that can be construed as an affirmative preservation by Congress of a unilateral management prerogative to discipline nonpreference eligible excepted service employees (App., *infra*, 46a-47a). Absent an express affirmative statement by the Congress, the Authority in *HHS, Region V* declined to read excepted service employees out of full coverage of the negotiated grievance procedure required by the Statute (App., *infra*, 47a).

Finding nothing to distinguish the instant case from *HHS, Region V*, the Authority ordered the Department of the Treasury to rescind its disapproval of the contract provisions providing full grievance

and arbitration rights to excepted service employees (App., *infra*, 21a).

3. The Department of the Treasury petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the Authority's decision and order. The court of appeals granted the agency's petition and denied enforcement of the Authority's order. The court of appeals concluded (as did the Seventh Circuit in *Department of Health and Human Services* v. *FLRA*, 858 F.2d 1278 (7th Cir. 1988)) that the resolution of the issue in this case is "substantially affected—if not controlled—by the Supreme Court's decision in *United States* v. *Fausto*, 108 S. Ct. 668 (1988)." (App., *infra*, 5a).[5] The court then resolved the issue in this case by applying only one of the three indicators used by this Court in *Fausto* to determine the availability of a judicial review forum, namely, the structure of review established in the CSRA. The court below concluded that the provisions in Title VII of the CSRA cannot survive in light of certain negative inferences drawn from Title II of the CSRA (App., *infra*, 6a-7a). In particular, the court below held that excepted service employees must be denied the right that Title VII

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[5] In *Fausto*, the issue was whether a nonpreference eligible excepted service employee could seek judicial review under the Tucker Act (28 U.S.C. 1491), based on the Back Pay Act (5 U.S.C. 5596), of a disciplinary action, a remedy available prior to the enactment of the CSRA but one not provided in the CSRA itself. 108 S. Ct. at 671. This Court determined the availability of such judicial review did not survive the enactment of the comprehensive CSRA scheme and it arrived at this determination by applying three "indicator[s] of nonreviewability": "the purpose of the CSRA, the entirety of its text, and the structure of review that it establishes." 108 S.Ct. at 671.

gives them to grieve disciplinary actions under negotiated grievance procedures because Congress did not also in Title II confer upon them the additional right to appeal such actions to the Merit Systems Protection Board (App., *infra*, 7a-13a).

The court of appeals cited *Fausto* as identifying two interrelated structural elements of the CSRA. These are, the court below said, that: 1) the MSPB is the primary body for resolving disputes over such disciplinary actions and, through the MSPB and the exclusive jurisdiction of the Federal Circuit to review MSPB decisions, a uniform body of law would develop; and 2) the CSRA generally grants a preferred position to competitive service and preference eligible excepted service employees (App., *infra*, 6a-7a).[6] In applying those elements to the instant case, it then found that allowing nonpreference eligible excepted service employees to arbitrate disciplinary actions would conflict with the CSRA's structure of review for adverse actions involving these employees.

Specifically the court of appeals noted that while employees entitled to MSPB review of discipline who are also covered by negotiated grievance and arbitration procedures may choose which of the procedures will be pursued, Congress maintained the primacy of the MSPB and the Federal Circuit by requiring that arbitrators be governed by MSPB precedent in resolving disciplinary matters (App., *infra*, 7a). Further, the court stated that under 5 U.S.C. 7121(f)

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[6] In *Fausto*, this Court found that the preference for competitive service and preference eligible excepted service employees would have been inverted if the judicial remedy sought there were available because it would have provided nonpreference eligible excepted service employees (the less preferred group) a remedy not available at all to the preferred groups. *Fausto*, 108 S. Ct. at 674.

and 7703(b)(1), appeals from arbitrators' awards on those matters which could have been reviewed by the MSPB must be taken to the Federal Circuit in the same manner as appeals from MSPB decisions (App., *infra*, 7a). But, the court continued, since disciplinary actions taken against nonpreference eligible excepted service employees are not matters which the MSPB can review, arbitrators would not be bound by MSPB precedent in those cases and their awards would not be reviewable by the Federal Circuit (App., *infra*, 8a-9a).[7] Accordingly, the court below concluded, the uniformity sought by Congress in such matters would not be preserved in cases involving nonpreference eligible excepted service employees (App., *infra*, 8a-9a).[8] The court also concluded that without the constraints of MSPB precedent, arbitrators could treat these employees more favorably than

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[7] Instead, the court below noted, exceptions to such awards would be reviewed by the Authority which the court characterized as more deferential than the Federal Circuit toward arbitral awards (App., *infra*, 9a).

[8] In its initial decision, the court of appeals further stated that cases involving nonpreference eligible excepted service employees would be subject to three levels of review (arbitration; the Authority; and courts of appeals other than the Federal Circuit), instead of the two provided for other employees (MSPB or arbitration; and the Federal Circuit) (App., *infra*, 10a). In its supplemental opinion accompanying its order denying rehearing, the court acknowledged that, with very limited exceptions, Authority decisions on arbitration awards are not reviewable in federal courts (App., *infra*, 16a). The court stated, however, that the lack of such review would further frustrate the uniformity desired in such cases by foreclosing the possibility of any federal court applying Federal Circuit law to cases involving discipline of nonpreference eligible excepted service employees (App., *infra*, 16a).

competitive service employees, thus inverting the CSRA's preference for competitive service employees (App., *infra*, 8a).[9]

For these reasons, the court of appeals found that providing nonpreference eligible excepted service employees with the right to challenge disciplinary actions through a negotiated grievance procedure would conflict with congressional purpose in enacting the CSRA. Accordingly, it granted the agency employer's petition for review and declined to enforce the Authority's order.

REASONS FOR GRANTING THE PETITION

In *United States* v. *Fausto*, 108 S. Ct. 668, 677 (1988), this Court concluded that a pre-CSRA judicial remedy available to nonpreference eligible excepted service employees had been eliminated because Congress withheld the remedy of judicial review from these employees when it enacted the comprehensive CSRA scheme. The court below concluded that *Fausto* reaches further, that it requires the elimination of a remedy that is itself actually part of the comprehensive CSRA scheme. As a result, the decision below erroneously denies to nonpreference eligible excepted service employees the remedy of grievance arbitration for disciplinary actions, even though Congress authorized that remedy for excepted service employees (regardless of their veterans preference) in Title VII of the CSRA.

The Federal Labor Relations Authority, as the federal agency which administers a significant por-

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[9] The court further perceived that such favorable treatment might "force OPM's hand" to extend MSPB appeal rights to nonpreference eligible excepted service employees for Chapter 75 matters even though Congress gave OPM the discretion not to do so (App., *infra*, 11a-12a).

tion of the CSRA scheme, seeks review of the decision below. The Authority submits that, contrary to the result below, *Fausto* does not require the nullification of one remedy that Congress specifically provided in the CSRA simply because Congress withheld a different remedy as to the same subject matter in another portion of the CSRA. Moreover, in the instant case, any such nullification would contravene specific congressional intent evident in the CSRA. When Congress in Title VII broadly authorized the remedy of grievance arbitration for disciplinary actions, the statutory language it chose reflects an awareness that such an arbitration remedy would extend to some employees who were not also being accorded the remedy of MSPB and judicial appeal rights in Title II. Thus, the comprehensive scheme that Congress fashioned in the CSRA recognizes that collective bargaining grievance rights acquired under Title VII of the CSRA can supplement Congress's determination as to who should be accorded appeal rights under Title II; and the plain language of Title VII, extending those rights to excepted service employees regardless of their veterans preference, should be honored.

If the decision below is allowed to stand, these collective bargaining grievance rights involving one of the most fundamental issues in the employment relationship will be eliminated for hundreds of thousands of federal employees. While this issue is also pending before the Ninth Circuit (*United States Department of Health and Human Services, Region IX* v. *FLRA*, Nos. 88-7192 and 88-7236 (9th Cir. oral arg. held May 10, 1989)), success for the Authority in that case will not prevent agency employers, in all future cases on this issue, from invoking the juris-

diction of the court below to secure the summary reversal of Authority decisions on this issue. See 5 U.S.C. 7123(a) (venue always appropriate in D.C. Circuit to challenge final Authority orders). Given the importance of the issue to both the construction of the CSRA and to nonpreference eligible excepted service employees throughout the federal government, and given that the incorrect resolution of this issue below was premised on this Court's *Fausto* decision,[10] review by this Court is plainly warranted.

1. Analysis of this case begins with the terms of the Statute, Title VII of the CSRA. Specifically, the Statute establishes its coverage by defining "employee" to include individuals employed by an agency but not members of the uniformed services, supervisors or management officials or certain other specified individuals. 5 U.S.C. 7103(a)(2). In addition, Congress also specified further exclusions from collective bargaining units, from among those who would otherwise meet the Statute's definition of employee, such as confidential employees, employees engaged in personnel work, and certain investigators and auditors. 5 U.S.C. 7112(b)(1)-(7). Finally, "agency" is defined to mean most Executive agencies, which of course includes the Department of the Treasury. 5 U.S.C. 7103(a)(3). Accordingly, it is undisputed that the Authority correctly determined that the Statute confers collective bargaining rights upon excepted service employees and allows excepted

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[10] Prior to the decision below, the Seventh Circuit also reversed the Authority's resolution of this issue, concluding this Court's *Fausto* decision "substantially informed" its analysis. *Department of Health and Human Services* v. *FLRA*, 858 F.2d 1278, 1283 (7th Cir. 1988).

service employees to be covered by the union's bargaining proposal here at issue.

The Statute further provides that "[a] labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, *all employees in the unit.*" 5 U.S.C. 7114 (a)(1) (emphasis added); see also 5 U.S.C. 7102(2) (each employee has the right to engage in collective bargaining with respect to conditions of employment through representatives chosen by the employees under the Statute).

In addition to establishing this general duty to bargain, the Statute also contains specific and detailed requirements regarding negotiated grievance procedures in the federal sector. Collective bargaining agreements between federal agencies and unions must by law include negotiated grievance procedures. 5 U.S.C. 7121(a)(1). These procedures must ensure, among other things, that a union has the right to present and process grievances on behalf of any employee in the bargaining unit represented by the union, 5 U.S.C. 7121(b)(3)(A); and, further, that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the union or the agency. 5 U.S.C. 7121(b)(3)(C).

Moreover, the Statute broadly defines the term "grievance" to include, among other things, "any complaint by any employee concerning any matter relating to the employment of the employee"; and any complaint "by any labor organization concerning any matter relating to the employment of any employee." 5 U.S.C. 7103(a)(9). As stated in the

House report, the Statute "is virtually all-inclusive in defining 'grievance'." H.R. Rep. No. 1403, 95th Cong., 2d Sess. 40 (1978).[11]

In enacting Section 7121 of the Statute, Congress stated that negotiated grievance procedures shall, unless the parties specifically agree otherwise, cover all matters that "under the provisions of law" could be submitted to such procedures. H.R. Rep. No. 1717, 95th Cong., 2d Sess. 157 (1978), *reprinted in Leg. Hist.* 825. Hence, a "broad scope" grievance procedure is intended by the Statute as the standard contractual arrangement. *AFGE Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640, 649 (D.C. Cir. 1983). Removed by law from the intended scope of a negotiated grievance procedure are those matters enumerated in 5 U.S.C. 7121(c), none of which involves excepted service employees; and the parties, by agreement, may remove other matters of their choosing (5 U.S.C. 7121(a)(2)). Finally, Section 7121(a) specifies that the grievance procedure shall be the exclusive procedure for resolving grievances which fall within its coverage, except as provided in 5 U.S.C. 7121(d) and (e). Accordingly, the Authority correctly concluded that the relevant statutory language and legislative history do not show that Congress in the labor-management relations portion of the CSRA intended to exclude some excepted service federal employees on the basis of their veterans preference status from the coverage of the negotiated

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[11] *Reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 686 (Comm. Print No. 96-7) [hereinafter *Leg. Hist.*].

grievance procedures which Congress required to be part of every collective bargaining agreement under the Statute.

Section 7121(e)(1) of the Statute reinforces the correctness of this conclusion. That section shows that Congress's permitting the negotiated grievance procedure to extend to such grievances was not intended to be contingent upon whether the employees involved were being given, in Title II of the CSRA, an appeal process for the subject of such grievances.

Section 7121(e)(1) states:

> Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters [to actions based on unacceptable performance and adverse actions covered under sections 4303 and 7512 of title 5] which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, *if any*, applicable to those matters, or under the negotiated grievance procedure, but not both. * * * [Emphasis added.]

Section 7121(e) thus guarantees employees, who independently possess a right to challenge disciplinary actions before the MSPB or other appeal fora, that they will not have that right extinguished by operation of Section 7121(a) of the Statute, which otherwise requires that the negotiated grievance procedure be the exclusive procedure for resolving grievances which fall within its coverage. See *Moreno* v. *MSPB*, 728 F.2d 499 (Fed. Cir. 1984); *NTEU*

v. *Cornelius*, 617 F. Supp. 365, 370 (D.D.C. 1985). While Section 7121(e) does not itself confer the right to grieve disciplinary actions,[12] it does embody the proposition that the Statute's negotiated grievance procedure can reach disciplinary actions which cannot be appealed to the MSPB or other alternate fora. This can be seen from Congress's use of the phrase "if any" in the second sentence of Section 7121(e)(1), which unequivocally indicates that Congress anticipated cases where negotiated grievance procedures would cover grievances over disciplinary actions despite the absence of any other appeal forum for those actions.

In sum, the explicit terms of the Statute do not even hint at precluding excepted service employees from filing grievances over disciplinary actions despite the fact that Title II of the CSRA withholds an appeal remedy. Rather, the terms of the Statute allow excepted service employees to file such grievances; and Section 7121(e)(1) of the Statute anticipates that there will indeed be certain employees like those in the excepted service who will be able to grieve these matters under a negotiated grievance procedure despite their not being able to challenge them under a Title II appellate procedure.

2. As indicated above, Title VII of the CSRA provides that employees within a unit of exclusive recognition may grieve disciplinary actions under negotiated grievance procedures which cover them where the parties to the agreement have not chosen to exclude such matters. Unless Congress can be shown to have clearly and affirmatively preserved an

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[12] Section 7121(e)(1) is not the statutory provision which confers the right to grieve disciplinary actions under the negotiated grievance procedure: other provisions of the Statute do that. 5 U.S.C. 7103(a)(9) and 7121(a).

agency's right to take virtually unfettered disciplinary action against the excepted service employees involved in this case, the provisions of Title VII must be given effect.

Relying almost exclusively on its reading of this Court's *Fausto* decision, the court of appeals perceived such clear congressional purpose in Title II of the CSRA, which withholds from nonpreference eligible excepted service employees the option of appealing, under 5 U.S.C. Chapters 43 and 75, major disciplinary actions to the Merit Systems Protection Board. However, the court below failed to recognize that the *Fausto* case arose in entirely different circumstances, where an employee sought judicial review of a disciplinary action based upon pre-CSRA access under the Tucker Act (108 S. Ct. at 671), despite the fact that Congress withheld the remedy of judicial review in the comprehensive CSRA scheme. This Court simply was not presented with the issue here: whether one Title of the comprehensive CSRA scheme should be construed to negate another Title of the same comprehensive scheme enacted by Congress at the same time. In any event, even assuming that the *Fausto* decision is applicable here, the court below failed even to mention—much less apply—two of the three factors which led to this Court's decision in *Fausto*, and misapplied the third factor.

a. The first two factors in the *Fausto* analysis (the purpose of the CSRA and the entirety of its text) support the Authority's resolution of the issue in this case rather than the lower court's conclusion. In deciding *Fausto*, this Court first examined "the purpose of the CSRA" and concluded that a leading purpose was to replace the pre-existing "haphazard arrangements" and "lengthy and complicated processes" concerning federal employee personnel mat-

ters. 108 S. Ct. at 671-672. Title VII's grievance arbitration process does not undercut this purpose; to the contrary, it is the CSRA which requires binding arbitration. Arbitration is neither haphazard nor lengthy and complicated. See, *e.g.*, 124 Cong. Rec. 25,722 (1978) (remarks of Cong. Ford) ("[Binding arbitration] has worked well as an expeditious, credible and cost-effective means of dispute resolution."). Moreover, it is consistent with and promotes an equally important purpose of the CSRA: the amicable resolution of disputes involving conditions of employment through the collective bargaining process. 5 U.S.C. 7101. There is nothing inherently inconsistent in according certain appeal and judicial review guarantees only to competitive and preference eligible excepted service employees while extending collective bargaining rights more broadly to non-preference eligible excepted service employees as well.[13] *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955). As discussed at pages 17 to 18, *supra*, Congress expressly recognized that the collective bargaining rights of Title VII, specifically arbitration of disciplinary actions, could apply where other appeal rights were denied.

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[13] By contrast, Congress has clearly stated its intention that probationary employees be denied any right to appeal or otherwise challenge an agency's decision to terminate them. Such conclusion was drawn from congressional enactments outside the CSRA which disclosed that Congress viewed the probationary period (a period which all excepted service employees are also subject to) as an extension of the examination and appointment process. From these enactments it could be determined that Congress clearly and affirmatively expressed the intention that no shackles whatever be placed on an agency's decision to summarily terminate probationary employees. See *Department of Justice* v. *FLRA*, 709 F.2d 724 (D.C. Cir. 1983).

With respect to "the entirety of [the CSRA's] text," the second analytical factor used by this Court in *Fausto* but ignored by the court below, it is the text of the CSRA itself at 5 U.S.C. Chapter 71 which provides for the remedial forum of contractual grievance arbitration concerning discipline. It should take the clearest expression of congressional intent to negate those statutory provisions (*i.e.*, 5 U.S.C. 7103(a)(2), 7103(a)(9), 7112(b), 7121(a)) which Congress enacted as an integral part of the comprehensive CSRA scheme. 108 S. Ct. at 676. No such intent is clearly discernible, in Title II of the CSRA or elsewhere, that employing agencies were to retain absolutely unfettered freedom to discharge nonpreference eligible excepted service employees at any time without challenge. Indeed, in 5 U.S.C. Chapter 43 (which governs personnel actions based on unacceptable job performance), Congress specified that nonpreference eligible excepted service employees were to retain many of the protections, *e.g.*, notice of a proposed action and opportunity to respond, 5 U.S.C. 4303(a)-(d), retained by competitive service and preference eligible excepted service employees. And in 5 U.S.C. Chapter 75 (which governs adverse actions taken against employees for the efficiency of the service, including actions based on misconduct), Congress specified in Section 7511(c) that OPM has the discretion to extend all the protections of that chapter, including MSPB appeal rights, to the nonpreference eligible excepted service employees.[14] These protec-

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[14] Additionally, nonpreference eligible excepted service employees possess a range of employment protections, including: the right to appeal a reduction in force to the MSPB (5 C.F.R. 351.901); to appeal the denial of a periodic step increase (5 U.S.C. 5335(c)); and to submit allegations of "pro-

tions are hardly indicative of a clear congressional intent to deny nonpreference eligibles the access to negotiated grievance procedures which Title VII of the CSRA specifically affords them. Thus, application of *Fausto*'s second factor, the entirety of the CSRA's text, supports the Authority's construction of Title VII of the CSRA as Congress wrote it.

b. Since the court below failed to address two of the three "indicator[s] of nonreviewability" identified in *Fausto* (108 S. Ct. at 674), it is questionable whether even a correct application of *Fausto*'s final indicator, "the structure of review that [the CSRA] establishes," could save the ultimate conclusion reached by the court below. In any event, the court of appeals misapplied the third factor in the *Fausto* analysis because careful consideration of that third factor simply does not argue against the full operation of 5 U.S.C. Chapter 71's grievance arbitration procedure to the excepted service employees here at issue.

In *Fausto*, this Court concluded that allowing nonpreference eligible excepted service employees to retain direct access to a judicial forum for resolution of their Back Pay Act disputes inverted the advantage owed to competitive service and preference eligible excepted service employees because it would have given a lesser preferred class of employees a remedy that was not even available to the preferred class of employees. 108 S. Ct. at 674. However, in this case, allowing nonpreference eligible excepted

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hibited personnel practices" to the Special Counsel of the MSPB for investigation (5 U.S.C. 2302 and 1206(a)(1)). Finally, unlike probationary employees (5 C.F.R. 771.206(c)(xiii)), OPM regulations do not preclude excepted service employees from grieving the merits of their termination for unsatisfactory performance under agency grievance procedures.

service employees simply to share in the grievance arbitration rights that the Statute also extends to the preferred class of employees does not give non-preference eligible excepted service employees anything more than these other preferred employees already have. Thus, there is no inversion of any preference here, as there would have been in *Fausto*.

Furthermore, aside from the merely equal access to grievance arbitration by competitive and excepted service employees which Chapter 71 requires, the CSRA continues to confer considerable advantage upon the preferred employees. Preferred employees have the option of using both the MSPB remedial forum and the right to court review of MSPB action, as well as arbitration, in appealing disciplinary actions. See 5 U.S.C. 7703(a). This is no small advantage. It means that the preferred employees will always have a remedial forum (the MSPB and the Federal Circuit) outside their agency, whereas the remedial forum of grievance arbitration is only available to employees who happen to be in units of exclusive recognition covered by a negotiated agreement containing provisions for arbitrating disciplinary actions. It also means that such preferred employees will always have the final say in whether to challenge disciplinary actions taken against them because MSPB appeal rights are theirs alone to invoke, whereas binding arbitration under a negotiated grievance procedure may only be invoked by the union, not the employee. 5 U.S.C. 7121(b)(3)(C).

This advantage to preferred employees also means that, if one of them succeeds before the MSPB in reversing a disciplinary action, there are several hurdles the agency employer must surmount before getting any judicial review of that decision (5 U.S.C.

7703(d)).[15] In contrast, when a nonpreference eligible excepted service employee wins before an arbitrator, the agency employer has the unrestricted ability to petition the Authority to set aside any arbitration award which is contrary to law or otherwise deficient (5 U.S.C. 7122(a)(1)). Finally, when a preferred employee loses before the MSPB, unlike when an agency employer loses, the preferred employee has an absolute right to secure judicial review of that decision (5 U.S.C. 7703(a)). In contrast, when a nonpreference eligible excepted service employee loses before an arbitrator, the union, not the employee, would decide whether to file exceptions to the arbitrator's award with the Authority (see *Local 1600, AFGE and the Naval Ordnance Station, Indian Head, Maryland*, 13 F.L.R.A. 345 (1983)); and with one narrow exception not applicable here, there is no court review of Authority decisions on exceptions to arbitration awards. 5 U.S.C. 7123(a)(1); *Griffith* v. *FLRA*, 842 F.2d 487 (D.C. Cir. 1988); *United States Marshals Service* v. *FLRA*, 778 F.2d 1432 (9th Cir. 1985).

Despite these clear advantages to the preferred employees over nonpreference eligible excepted service employees, the court of appeals erroneously concluded that there is an inversion of preference in allowing

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[15] Under 5 U.S.C. 7703(d), an agency's petition for review must be brought by the Office of Personnel Management, not by the agency. Such a petition can only be brought by OPM if, in addition to the agency, OPM has participated in the administrative processing of the case. Finally, the granting of such a petition for judicial review is at the discretion of the court of appeals, and the Federal Circuit, the court to which such petitions are addressed, has noted that such petitions are to be granted only in "exceptional" cases. See *Devine* v. *Sutermeister*, 724 F.2d 1558, 1566 (Fed. Cir. 1983).

Chapter 71's grievance arbitration rights to extend to those employees. The sole basis for this conclusion below was 5 U.S.C. 7121(e)(2), which encourages decisional uniformity by obligating arbitrators to use the burdens of proof established in 5 U.S.C. 7701 (c)(1) in those matters which could have been appealed to the MSPB. However, Section 7121(e)(2) only obligates arbitrators to use the burdens of proof established in 5 U.S.C. 7701(c)(1) in those matters which could have been appealed to the MSPB. Thus, Congress's concern with respect to uniformity in Section 7121(e) is more narrow than found by the court of appeals. Congress chose only to deter forum shopping and promote consistency of result in those cases where an alternative MSPB appeal route was available. See *Cornelius* v. *Nutt*, 472 U.S. 648, 661-662 (1985). Congress could have, but did not, require arbitrators to use these standards in resolving all disciplinary disputes. *E.g.*, *Nieuwdorp* v. *Library of Congress*, 872 F.2d 1000 (Fed. Cir. 1989) (employees in "other personnel systems" have their challenges to discipline resolved under the grievance arbitration procedures which cover them; 5 U.S.C. 7121(e)(2) does not require that the burdens of proof established in 5 U.S.C. 7701(c)(1) govern the processing of such grievances).

In *Fausto*, this Court also concluded (108 S. Ct. at 674-675) that allowing nonpreference eligible excepted service employees to retain direct access to a judicial forum for resolution of their Back Pay Act disputes undermined the primacy of the MSPB and the Federal Circuit for administrative resolution of disputes over disciplinary actions. This primacy enabled the development of a unitary Executive Branch position on matters involving personnel action,

avoided unnecessary layers of review, and encouraged more consistent judicial decisions. 108 S. Ct. at 674.

With respect to the issue in this case, however, the court below erred in concluding that the absence of Federal Circuit primacy would trouble the Congress that enacted the CSRA. Like Section 7121 (e)(2), which clearly defines those circumstances in which Congress wanted symmetry in personnel action cases with respect to burdens of proof, Section 7121(f) of the Statute provides for symmetry of appellate review in the Federal Circuit only for those matters which could have been appealed to the MSPB. Congress could have required all arbitration awards which resolve personnel actions to be reviewable by the Federal Circuit. However, in Section 7121(f), Congress provided otherwise. Indeed, the Federal Circuit, the very forum which the court below concludes must unify personnel action arbitration decisions, is untroubled by the fact that it does not have jurisdiction under Section 7121(f) to review all adverse personnel action arbitration awards. See *Nieuwdorp* v. *Library of Congress*, 872 F.2d 1000 (Fed. Cir. 1989). Accordingly, the court below erroneously concluded that the absence of Federal Circuit review for this category of adverse personnel action arbitration awards would trouble the Congress which gave appellate review of arbitral awards its particularized attention in Section 7121(f).

In any event, the three policy interests which this Court in *Fausto* found were protected by MSPB and Federal Circuit primacy (see 108 S. Ct. at 674) are also protected by Authority review of arbitration awards involving the discipline of nonpreference eligible excepted service employees. An aggrieved party may file exceptions to such an arbitration award with

the Authority (5 U.S.C. 7122(a)), and there is no judicial review of the Authority's action with respect to such award except in the extremely limited circumstance where the Authority's order involves an unfair labor practice. See 5 U.S.C. 7123(a)(1); and cases cited at page 24, *supra*.

Thus, as to the first policy interest noted in *Fausto*'s discussion of MSPB/Federal Circuit primacy (108 S. Ct. at 675), Authority review of all arbitration awards involving discipline of nonpreference eligible excepted service employees enables the Executive Branch to develop a unitary and consistent position on matters involving such personnel action. Further, with respect to the second policy interest, unnecessary layers of review are avoided because there are only two layers of review of such nonpreference employee disciplinary actions (the arbitrator and the Authority). Finally, while Federal Circuit primacy was desired in order to foster the third policy interest in *Fausto* of encouraging more consistent judicial decisions, the consistent decisions in the area of arbitration for these nonpreference employees will come from the unifying and final appellate forum provided by the Authority itself under 5 U.S.C. 7122(a).

In conclusion, the Authority's construction of the interplay between Title II and Title VII of the CSRA gives effect to all parts of the comprehensive CSRA scheme. Before the court below is permitted to use this Court's *Fausto* decision to impliedly repeal a portion of that scheme, the significant issue presented here, which affects the rights of hundreds of thousands of federal employees, should receive this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.[16]

Respectfully submitted.

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NOVEMBER 1989

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[16] The Acting Solicitor General authorizes the filing of this petition by the Federal Labor Relations Authority.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 6, 1989 Decided May 2, 1989

No. 88-1159

DEPARTMENT OF THE TREASURY,
OFFICE OF CHIEF COUNSEL, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT
NATIONAL TREASURY EMPLOYEES UNION, INTERVENOR

Petition for Review and Cross-Application for Enforcement of an Order of the Federal Labor Relations Authority

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Peter R. Maier, Attorney, Department of Justice, with whom *John R. Bolton*, Assistant Attorney General, and *William Kanter*, Attorney, Department of Justice, were on the brief, for petitioner.

Robert J. Englehart, Attorney, Federal Labor Relations Authority, with whom *William E. Persina*, Acting Solicitor, and *Arthur A. Horowitz*, Associate Solicitor, Federal Labor Relations Authority, were on the brief, for respondent. *Ruth E. Peters*, Attorney,

Federal Labor Relations Authority, also entered an appearance for respondent.

Clinton D. Wolcott, with whom *Gregory O'Duden* and *Elaine Kaplan* were on the brief, for intervenor. *Lois G. Williams* also entered an appearance for intervenor.

Before: RUTH B. GINSBURG, SILBERMAN and BUCKLEY, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: This case raises the issue whether federal employees in the excepted service, who have no statutory right to appeal adverse personnel actions, may nevertheless require an agency to bargain over creation of a grievance arbitration procedure permitting a challenge to those personnel actions. The Treasury Department, contending that arbitration over such matters is inconsistent with federal law and thus non-negotiable under Title VII of the Civil Service Reform Act ("CSRA"), petitions for review of a Federal Labor Relations Authority decision holding the contrary. We conclude that the legislative history and structure of the CSRA do show that Congress intended these excepted service employees to have no right to arbitral review, and therefore grant the petition for review.

I.

The CSRA divides civil service employees into three main classifications: senior executive service (whose status is not relevant to this case), competitive service, and excepted service. Generally speaking, employees in the competitive service, who must pass civil service exams, are granted an array of substantive and procedural protections not bestowed on

excepted service employees—unless the latter are veterans, in which case they are referred to as "preference eligibles," 5 U.S.C. § 2108(3) (1982),[1] and treated for purposes of adverse actions similarly to those in the competitive service.[2] Excepted service employees gain admission into the federal service without the need to pass civil service exams (although many are highly skilled), and presumably for that reason, Congress thought it inappropriate to grant them certain statutory rights available to those in the competitive service, unless they were veterans. We shall refer to nonpreference eligible excepted service employees, whose status and rights are at issue in this case, as NEES employees.

Perhaps the most important protections enjoyed by the competitive service are those—set forth in chapters 43 and 75 of the Act—which buffer the prospect of discipline or discharge. Chapter 43 grants agencies authority to "reduce in grade or remove an employee for unacceptable performance," 5 U.S.C. § 4303(a) (1982) & Supp. V 1987), and chapter 75 permits the discipline of any employee for "such cause as will promote the efficiency of the service." *Id.* § 7513(a). In either case, however, a competitive service employee or a veteran in the excepted service may, as a matter of right, appeal such "adverse action" to the Merit System Protection Board, *id.* § 4303(e); *id.* § 7513(d), 7511(a), and, if dissatisfied with the MSPB's decision, appeal further

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[1] The statute also classifies certain close relatives of veterans as preference eligibles, but for convenience we will equate preference eligibles and veterans.

[2] By our use of "competitive service employees" throughout this opinion, we refer to both competitive service and preference eligible expected service employees.

to the United States Court of Appeals for the Federal Circuit. *Id.* § 7703(b)(1). This right to appeal adverse actions under either chapter is not granted to NEES employees, *id.* § 4303(e), § 7511(a), although Congress delegated to the Office of Personnel Management authority to grant any category of the excepted service the right to appeal to the MSPB (and thereby to the Federal Circuit) adverse disciplinary actions under chapter 75 (but not adverse actions under chapter 43). *Id.* § 7511(c). OPM has not as yet chosen to exercise that authority with respect to the NEES employees involved here.

The National Treasury Employees Union represents both competitive service and excepted service employees in the Chief Counsel's Office of the IRS. The union sought a collective bargaining agreement, applying to both categories of employees, that would permit arbitration of adverse personnel action covered by chapters 43 and 75. The Treasury Department, upon review of the proposed agreement by the head of the agency, *see id.* § 7114(c)(1), rejected that part of the agreement that would give those arbitration rights to NEES employees because, Treasury maintained, to do so would be "inconsistent with Federal law." *Id.* § 7117(a)(1).

The union appealed Treasury's nonnegotiability determination to the FLRA under 5 U.S.C. § 7117(c), and the FLRA, disagreeing with Treasury, held the proposed contract negotiable. The government, in turn, has petitioned for review of the FLRA's decision here. The question before us is whether Congress permitted NEES employees to gain through collective bargaining, under one portion of the CSRA, adjudicatory appeal rights that were denied them under other parts of the Act. We are thus required

to consider the functional interrelationship of various institutions under those statutes: arbitrators, the FLRA, the MSPB, OPM, the Federal Circuit, and the other courts of appeals. Although the FLRA is entitled to deference when interpreting its own organic legislation (the Labor-Management Relations Statute), that is not so when we are obliged to interpret other chapters of the CSRA. *NTEU v. FLRA*, 248 F.2d 1273, 1275 (D.C. Cir. 1988); *Department of Justice v. FLRA*, 709 F.2d 724, 729 n.21 (D.C. Cir. 1983).

II.

Treasury argues that the exclusion of NEES employees from MSPB review under both chapters 43 and 75 necessarily means that proposals for grievance arbitration procedures to review adverse personnel actions are nonnegotiable. The FLRA, on the other hand, contends it does not follow that merely by withholding MSPB review rights, Congress meant to exclude NEES employees from access to contractual grievance procedures that lead to arbitration of these issues. *NTEU and Dep't of Treasury*, 30 F.L.R.A. No. 81 (1987); *see NTEU and Dep't of HHS*, 25 F.L.R.A. 1110 (1987), *rev'd sub nom. Department of HHS v. FLRA*, 858 F.2d 1278 (7th Cir. 1988). We, like the Seventh Circuit in *Department of HHS*, agree with the Treasury Department that arbitral review of adverse personnel actions for NEES employees is inconsistent with the remedial scheme constructed by Congress in the CSRA.

We think, as did our sister circuit, that the issue is substantially affected—if not controlled—by the Supreme Court's recent decision in *United States v. Fausto*, 108 S. Ct. 668 (1988). There, the Court held that the CSRA precluded a suit for backpay in the

United States Claims Court by an excepted service employee who had no right to review of an agency suspension under the CSRA. An inquiry into civil service remedies, according to *Fausto*, must proceed by "examining the purpose of the CSRA, the entirety of its text, and the structure of review that it establishes." *Id.* at 671. This is so because the CSRA replaced an outdated and inefficient patchwork system with "an *integrated* scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.* at 672 (emphasis added).

Fausto identified two interrelated structural elements of the CSRA which led to the Court's conclusion that NEES employees could not seek a remedy under the Back Pay Act for allegedly unauthorized suspensions. First, the Court recognized that the CSRA establishes the MSPB as a primary body for resolving disputes over adverse personnel actions, and the Federal Circuit as the exclusive locus of judicial review of MSPB decisions. This scheme "enables the development, through the MSPB, of a unitary and consistent Executive Branch position on matters involving personnel action," and exclusive Federal Circuit review "[e]ncourages more consistent judicial decisions . . . ." *Id.* at 674 (quoting S. REP. No. 969, 95th Cong., 2d Sess. 52 (1978)). To allow NEES employees to litigate adverse actions in the Court of Claims under the Back Pay Act would have destroyed that consistency and uniformity.

Second, the Court acknowledged, as had we, that the CSRA generally grants a preferred position to competitive service and preference eligible employees relative to nonpreference eligible excepted service and

probationary employees.[3] *Id.* at 674; *see Harrison v. Bowen*, 815 F.2d 1505, 1510 (D.C. Cir. 1987). The Court of Claims remedy sought by Fausto would have inverted the preferences by allowing judicial review for excepted service and probationary employees where such review was unavailable for the preferred groups. *Fausto*, 108 S. Ct. at 674.

A similar analysis leads us to reject the FLRA's position here. Congress permitted competitive service employees covered by a collective bargaining agreement to choose, when challenging adverse action under chapters 43 and 75, either review through arbitration or the MSPB. 5 U.S.C. § 7121(e)(1) (1982). But, recognizing that the two procedures might lead to inconsistent treatment, Congress adopted an unusual and sophisticated device to ensure uniformity and MSPB primacy. If an employee chooses arbitration, the arbitrator is governed by MSPB precedent and may not interpret a collective bargaining agreement to reach results that would not be countenanced by the MSPB under its interpretation of the statute. *Id.* § 7121(e)(2). That suggests that Congress did not wish competitive service employees represented by a union to achieve significant protections from removal, demotion, discipline, or discharge under chapters 43 and 75 not available to non-union competitive service employees. To further ensure uniformity, the statute provides that appeals from either the MSPB or the arbitrator that involve this class of cases must be taken only to the Federal Circuit. *Id.* § 7121(f), § 7703(b)(1) (1982 & Supp. V 1987).

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[3] Probationary employees are those in any of the three major classifications who must serve a probationary period before final appointment; while probationers, employees enjoy distinctly limited procedural protections and can be dismissed summarily.

Therein lie the defects in the union's proposal as it applies to NEES employees. If NEES employees could contest adverse personnel actions through arbitration, which they cannot appeal to the MSPB, arbitrators would not be statutorily bound to apply MSPB precedent to those proceedings, *see U.S. Soldiers and Airmen's Home and AFGE, Local 3090*, 11 F.L.R.A. 692 n.* (1983), and could treat NEES employees more favorably than competitive service employees, thereby inverting the Act's preference for the latter category of employees.[4] In this case, to be sure, the same collective bargaining agreement would cover both competitive service and NEES employees, so it might be thought that arbitrators would tend to apply the statutory standards to both categories. But arbitrators would not be so obliged by the CSRA. Moreover, consistent treatment of the two categories would seem less likely if NEES employees were represented—as we must contemplate—in a separate unit.

The uniformity problem is compounded, because normally arbitrators' decisions under the LMRS may be appealed to the FLRA; only matters under chapters 43 and 75 (applying to the competitive service and veterans) must be appealed to the Federal Cir-

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[4] The CSRA provides that the MSPB shall sustain an agency decision based on unacceptable performance if it is supported by substantial evidence, 5 U.S.C. § 7701(c)(1)(A) (1982), and shall uphold disciplinary action taken under chapter 75 if it is supported by a preponderance of the evidence. *Id.* § 7701(c)(1)(B). The statute also requires that any alleged flaw in the agency's procedures must constitute "harmful error" in order to justify reversal by the MSPB. *Id.* § 7701(c)(2)(A). But under the proposed grievance procedure, an arbitrator hearing a grievance of an NEES employee would be guided by the collective bargaining agreement rather than these statutory standards.

cuit. Therefore, an arbitrator's determination as to the propriety of adverse personnel actions taken against an NEES employee could be appealed only to the FLRA, which must apply a very deferential standard of review on most issues, 5 U.S.C. § 7122(a) (1982 & Supp. V 1987), akin to that which governs judicial review of arbitration in the private sector. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (courts may not review merits of an arbitration award as long as it is based on interpretation and application of the collective bargaining agreement).[5] By contrast, the Federal Circuit is directed to set aside an arbitral award to a competitive service employee or veteran if, *inter alia*, it is unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1982 & Supp. V 1987); *Wade v. Department of Navy*, 829 F.2d 1106, 1108-10 (Fed. Cir. 1987).

The FLRA suggests an imaginative, if jerry-built, approach to prevent an inverted preference for NEES employees and to achieve uniformity of review. It contends we could hold that the FLRA, when reviewing arbitrators' decisions dealing with NEES employees, must adhere to MSPB precedent as it applies to the competitive service. That proposal strikes us as a proposed amendment of the statute appropriately directed to Congress. Even were we to adopt it, there is of course no assurance, as the FLRA im-

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[5] Section 7122 provides that the FLRA may take such action as it considers necessary if, upon review of an arbitral award, it finds the award is deficient—

(1) because it is contrary to law, rule, or regulation; or

(2) on other similar grounds to those applied by Federal courts in private sector labor-management relations.

5 U.S.C. § 7122(a) (1982).

plicitly assumes, that all other circuits to which FLRA decisions may be appealed would follow our lead. And, if we were to accept the FLRA's suggestion, we would ignore another element of Congress' plan for uniformity: that these kinds of cases no matter where they were initially tried would ultimately be reviewed by the Federal Circuit. *See* S. REP. No. 969, 95th Cong., 2d Sess. 52 (1978); *Fausto*, 108 S. Ct. at 674. (Paradoxically, FLRA decisions may be appealed to all courts of appeal but the Federal Circuit). A regime whereby the other twelve courts of appeals (but not the Federal Circuit) apply Federal Circuit law in this class of cases seems quite at odds with congressional purpose. Congress originally allowed for review of an MSPB decision "in the Court of Claims or *a* United States court of appeals," *see* 5 U.S.C. § 7703(b)(1) (Supp. II 1978) (emphasis added), *amended by* 5 U.S.C. § 7703(b)(1) (1982), but subsequently amended the statute to limit review to the Federal Circuit, precisely to avoid the problems of varying decisions in the regional courts of appeals. *See* 5 U.S.C. § 7703(b)(1) (1982); H.R. REP. No. 312, 97th Cong., 1st Sess. 17 (1981) (creation of Federal Circuit ensures uniformity in "administration of law in the area[] of . . . merit system protection"; S. REP. No. 275, 97th Cong., 1st Sess. 3, 4 (1981) (same).

We also note that if the FLRA were affirmed, NEES cases would involve three layers of review of agency action (arbitration—FLRA—court of appeals) rather than the two envisioned by Congress for the competitive service and veterans (MSPB—Federal Circuit or arbitration—Federal Circuit). That outcome seems plainly at odds with Congress' intent to streamline review of adverse personnel actions. *See Fausto*, 108 S. Ct. at 674.

We see, then, that the FLRA's interpretation of the statute runs the risk of inverting the preference granted to competitive service employees and veterans vis-a-vis NEES employees, and threatens MSPB primacy in developing administrative law governing adverse actions against federal employees—both considerations which underlay the Supreme Court's concern in *Fausto*. And the FLRA's suggestion to ameliorate these problems, even were we authorized to accept it, would undermine the Federal Circuit's role in the statutory scheme and introduce an added—and unwanted—level of review.[6]

The FLRA's statutory interpretation, moreover, creates other anomalies inconsistent with congressional purposes. Congress specifically delegated to OPM, not the FLRA, discretion to extend statutory appeal rights under chapter 75 to NEES employees. In other words, OPM, the Executive Branch's personnel management arm, was given the extraordinary authority to trigger MSPB and federal judicial review of Executive Branch disciplinary actions against

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[6] We also reject the FLRA's assertion, as we did in *Department of Justice v. FLRA*, 709 F.2d 724, 728-29 (D.C. Cir. 1983), that because Congress did not exclude excepted service employees from the broad definitions of "employee" and "grievance," *see* 5 U.S.C. §§ 7103(a)(2), 7103(a)(9) (1982), it must have intended to permit grieving of adverse actions. In *Department of Justice*, we held that probationary employees could not compel a federal agency to bargain over a grievance procedure addressing termination of probationers. Though the structure of the CSRA may bear somewhat differently on NEES employees than it does on probationers, we adhere to our view that "[d]etermination of negotiability issues cannot be resolved by mere reference to the broad definitional provisions in the statute." *Department of Justice*, 709 F.2d at 729 n.22.

NEES employees. Were we to accept the FLRA's position—thus allowing NEES employees covered by a collective bargaining agreement to gain these appeal rights through arbitration—OPM, in order to insure uniformity over the resolution of these issues, could well feel obliged to extend MSPB review to all NEES employees. By taking that action, which would oust the FLRA of jurisdiction, OPM could prevent potential inconsistencies in personnel actions—at least with respect to chapter 75—but only at the cost of surrendering the independence of its decision whether to extend MSPB and judicial review of this class of employees. The FLRA, it would appear, may in that way force OPM's hand, an outcome which seems inconsistent with the congressional delegation to OPM.[7]

Even if OPM did extend chapter 75 review procedures to NEES employees, it would lack the statutory authority to do so for chapter 43 personnel actions (based on unacceptable performance). This would mean unionized NEES employees could gain a substantial advantage over those not covered by col-

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[7] Intervenor NTEU argues that Congress never meant for OPM to have complete discretion in this area, but only discretion to determine which excepted service employees held positions of confidential or policymaking character (and should thus be excluded from MSPB review). Although there is some legislative history indicating that Congress meant for OPM to perform the sorting function that intervenor suggests, we cannot read that legislative history to narrow drastically the broad grant of discretion given by the plain language (and the legislative history) of Section 7511(c). *See* S. REP. No. 969, 95th Cong., 2d Sess. 49 (1978) (subsection 7511(c) "permits the Office of Personnel Management, *in its discretion*, to extend adverse action and appeal coverage to positions or groups of positions [in the excepted service]") (emphasis added).

lective bargaining agreements, because the former could gain review by an arbitrator of discipline or discharge for poor work performance, while the latter would have no such right of review by either an arbitrator or the MSPB. Generally, however, as we have noted, the statutory structure manifests a desire for equal substantive protections against discipilne or discharge for all federal employees in the same classification. *See, e.g.*, 5 U.S.C. § 7121(e), § 7121(f) (1982). We think it implausible, therefore, that Congress intended to permit such disparate treatment for unionized NEES employees on this particular matter.

That Congress envisioned the availability of grievance procedures for certain specialized personnel, notwithstanding the absence of a statutory right of appeal, does not alter our conclusion that arbitration is unavailable for NEES employees. Congress provided that matters relating to adverse personnel actions which arise under "*other personnel systems* . . . may, in the discretion of the aggrieved employees, be raised either under the appellate procedures, *if any*, applicable to those matters, or under the negotiated procedure, but not both." 5 U.S.C. § 7121(e)(1) (emphasis added). The inclusion of the words "if any" does show Congress contemplated that some of these employees, who fall under specialized personnel systems apart from the main civil service system, would negotiate for grievance procedures although they have no statutory right of appeal. *See* S. REP. NO. 969, 95th Cong., 2d Sess. 110 (1978) (discussing "other personnel systems . . . such as those provided in title 38," relating to veterans' benefits). The excepted service personnel involved in these cases, however, are covered by the main civil service system and not by the provision relating to specialized personnel sys-

tems; section 7121(e)(1) thus does not affect our analysis of the remedial structure set forth in title 5.

The CSRA establishes a comprehensive remedial framework governing the civil service. Congress carefully constructed a scheme that would ensure uniformity in personnel decisions and promote efficiency of administration. By authorizing an ancillary approach for NEES employees, the FLRA's position would undermine the structure of the CSRA. We thus grant the petition for review.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988

No. 88-1159

DEPARTMENT OF THE TREASURY
OFFICE OF CHIEF COUNSEL, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT
NATIONAL TREASURY EMPLOYEES UNION, INTERVENOR

[Filed July 17, 1989]

BEFORE: Ruth B. Ginsburg, Silberman and Buckley, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing of respondent and intervenor it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
For the Court:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

A statement of Circuit Judge Silberman, joined by Circuit Judges Ruth B. Ginsburg and Buckley, is attached.

SILBERMAN, *Circuit Judge*, joined by RUTH B. GINSBURG, and BUCKLEY, *Circuit Judges*: Petitioner, the FLRA, correctly brings to our attention that we overlooked our earlier opinion in *Griffith v. FLRA*, 842 F.2d 487 (D.C. Cir. 1988), holding that the merits of arbitration awards appealed to the FLRA are not further reviewable in *any* federal court unless the arbitrators' decision (and the FLRA's affirmance) is challenged as unconstitutional or falls within the narrow bounds of the *Leedom v. Kyne*, 358 U.S. 184 (1958), exception to statutory provisions. That is so because section 7123(a) provides that:

> Any person aggrieved by any final order of the Authority *other than an order under*
>
> (1) Section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title

may institute an action for judicial review of the authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia. 5 U.S.C. § 7123(a) (1982) (emphasis added). *See Griffith*, 842 F.2d at 490-92.

This point, however, weakens rather than strengthens the FLRA's position in this case because it means the federal judiciary presumably would be powerless to ensure that the FLRA, in its review of arbitration awards involving adverse personnel actions taken against excepted service employees, followed the MSPB law that the FLRA conceded ought to apply. Indeed, in light of *Griffith* and the statutory language it interpreted, it is doubtful that we have the power

to accept the FLRA's suggestion made at oral argument that, in this case, we hold it bound by MSPB law in reviewing arbitration awards dealing with adverse actions. In that regard, we think the FLRA's counsel was obliged to acknowledge that difficulty and to cite to *Griffith*. We are disappointed that he did not do so.

The FLRA's interpretation would circumvent the congressional design that there be uniform standards governing employee appeals from adverse personnel actions, the class of employee and his union or non-union status notwithstanding. Congress engineered this result in the CSRA by providing "no matter where [adverse personnel action cases] were initially tried, [they] would ultimately be reviewed by the Federal Circuit." Slip op. at 9. It hardly enhances the FLRA's position to point out that under its interpretation of the Act, its review of arbitration awards of adverse action against excepted service employees would be, for the most part, unreviewable by any court. That would ensure the loss of Federal Circuit supervision—directly or indirectly.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988

No. 88-1159

DEPARTMENT OF THE TREASURY
OFFICE OF CHIEF COUNSEL, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT
NATIONAL TREASURY EMPLOYEES UNION, INTERVENOR

[Filed July 17, 1989]

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

The Suggestions For Rehearing *En Banc* of Respondent and Intervenor have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

For the Court:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX D

30 FLRA No. 81

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. O-NG-1447

NATIONAL TREASURY EMPLOYEES UNION, union

and

DEPARTMENT OF TREASURY
OFFICE OF CHIEF COUNSEL, AGENCY

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. *Statement of the Case*

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The case presents issues concerning the negotiability of two provisions of a contract which were agreed to locally by the parties but disapproved during review of the agreement by the Agency head pursuant to section 7114(c) of the Statute. The provisions would permit non-preference eligible excepted service employees to appeal adverse actions under the parties' negotiated grievance procedure. We find that both provisions are within the duty to bargain.

II. *Background*

The disputed provisions in this case—Article 5, Employee Grievance Procedure and Article 6, Arbitration—were disapproved by the Agency head "to the extent these articles apply the grievance procedure and arbitration to those personnel actions involving excepted service employees and probationary employees, where pursuant to 5 U.S.C. 4303 and 5 U.S.C. 7511, such employees have no right of appeal to the Merit Systems Protection Board." *See* Memorandum of August 10, 1987, attached to the Union's Petition for Review. Articles 5 and 6, which are set forth in the Appendix to this decision, are intended to provide excepted service employees with certain appeal rights under the collective bargaining agreement. *See* Union Petition for Review at 2; Agency Statement of Position at 2. Nothing in the record indicates that the disputed provisions apply to probationary employees. Our decision addresses only the provisions' application to excepted service employees.

III. *Positions of the Parties*

The Agency contends that providing excepted service employees with access to grievance procedures is inconsistent with Federal law and Government-wide regulations. The Agency acknowledges that in *Naitonal Treasury Employees Union and Department of Health and Human Services, Region V, Chicago, Illinois*, 25 FLRA 1110 (1987), *petition for review filed sub nom. United States Department of Health and Human Services v. FLRA*, No. 87-1595 (7th Cir. April 13, 1987), the Authority found negotiable a provision which would permit excepted service employees to be included within negotiated grievance and arbitration procedures. The Agency requests that we reconsider that decision, and contends that

Congress preempted agencies from granting through labor negotiations grievance procedure rights to non-veteran employees in the excepted service.

The Union also notes the Authority's decision in *NTEU and HHS*, 25 FLRA 1110, and states that the Authority held in that case that the grant of adverse action protections to excepted service employees was consistent with Congressional intent and within the duty to bargain. According to the Union, the Agency has not presented any new arguments which the Authority did not decide in the *HHS* case. The Union contends that its proposal is consistent with the Congressional scheme enacted in the Civil Service Reform Act and is within the duty to bargain.

IV. *Discussion*

Articles 5 and 6 involve grievance and arbitration procedures which would permit excepted service employees to grieve adverse actions taken against them. As noted by the parties, the articles are to the same effect as the proposal at issue in *NTEU and HHS*. In that case, the Authority found negotiable a proposal which would include excepted service employees within the coverage of the grievance, adverse action, and arbitration articles of the parties' negotiated agreement. The Authority considered the same arguments as those presented in this case, and found that Congress did not intend to exclude excepted service employees from coverage of negotiated grievance procedures. Nothing in the record in this case warrants a contrary conclusion as to Articles 5 and 6.

Consequently, for the reasons more fully set forth in *Department of Health and Human Services*, we find that Article 5 and Article 6 are within the duty to bargain.

V. *Order*

The Agency must rescind its disapproval of Article 5 and Article 6.*

Issued, Washington, D.C., December 30, 1987.

/s/ Jerry L. Calhoun
JERRY L. CALHOUN
Chairman

/s/ Jean McKee
JEAN MCKEE
Member
FEDERAL LABOR
RELATIONS AUTHORITY

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* In finding that Article 5 and Article 6 are within the duty to bargain, we make no judgment as to their merits.

APPENDIX

ARTICLE 5 EMPLOYEE GRIEVANCE PROCEDURE

Section 1: Objectives and Purposes

A. The Employer and the Union recognize and endorse the importance of bringing to light and adjusting problems promptly and; whenever possible, informally. For purposes of this Agreement, adjusting problems informally contemplates adjustments arrived at between an employee and a manager; an employee, a manager and a Union representative; or a manager and a Union representative.

B. The purpose of this article is to provide an orderly method for the processing and disposition of grievances brought by employees or by the Union on behalf of employees. This article does not apply to the filing of institutional grievances concerning the effect or interpretation, or a claim of breach of the provisions of this Agreement relating to the rights and benefits accruing to the Union as the exclusive representative of bargaining unit employees.

C. The Union agrees to submit virtually all contract-related matters to the negotiated grievance procedure for final disposition and to use sparingly unfair labor practice procedures concerning contract-related issues which may occur in the day-to-day administration of this Agreement.

D. 1. Employees who believe they have been illegally discriminated against on the basis of race, color, religion, sex, national origin, age or handicapping condition have the right to raise the matter under the statutory pro-

cedure or the negotiated grievance procedure of this Agreement, but not both. Employees shall be deemed to have exercised their right of choice at such time as they timely file a formal written EEO complaint or file a timely grievance under this procedure.

2. When the employee elects to raise the matter under this negotiated grievance procedure, the grievant shall specify the specific nature of the discrimination (e.g. race, religion), the facts upon which the allegation is based, and the name of the alleged discriminating official.

Section 2: *Definitions*

The following definitions apply to the terms used in this article:

a. the term "Employer" means the National Office within the Office of Chief Counsel, Internal Revenue Service;

b. the term "Union" means National Treasury Employees Union (NTEU) and/or local chapter 251 of NTEU;

c. the term "employee" means any member of the bargaining unit;

d. the term "grievance" means any complaint:

   1. by an employee concerning any matter relating to the employment of the employee;

   2. by the Union concerning any matter relating to the employment of any employee; or,

   3. by an employee or the Union concerning (i) the effect or interpretation, or a claim of a breach of a collective bargaining agreement or (ii) any claimed violation, misinterpreta-

tion, or misapplication of any law, rule or regulation affecting conditions of employment.

e. The term "grievance" does not mean a complaint pursuant to 5 USC 7121(c) concerning:

1. a claimed violation of subchapter II of chapter 73 of title 5 (relating to prohibited political activities);
2. retirement, life insurance, or health insurance;
3. a suspension or removal pursuant to 5 USC 7532, dealing with national security;
4. an examination, certification, or appointment, or,
5. the classification of any position which does not result in the reduction in grade or pay of any employee.

f. The term "days" means calendar days.

Section 3: *Grievance Procedure—General*

A. This procedure will be the exclusive procedure available for the processing and disposition of grievances, except when the employee has a statutory right of choice, i.e., adverse actions, actions taken for unacceptable performance, or EEO complaints.

B. Grievances under this procedure may be initiated by the employees, the Union, or jointly.

C. Where an employee has initiated a grievance and does not elect to be represented by the Union, the Union will have a right to be present at all discussions between the employee and the Em-

ployer concerning the grievance. The Employer will resolve all grievances presented under such circumstances consistent with the terms and conditions of this Agreement. In addition, the steward appointed to represent the organizational segment of the grieving employee will be timely provided with a copy of the Employer's decision resolving the grievance.

D. Employees will have the right to be accompanied, represented, and advised by the authorized representative of the Union as set forth in the steps enumerated below. Union stewards who grieve on their own behalf may select the steward of their choice.

Mass Grievances

E. In the event that two or more employees have designated the Union to serve as their representative on one or more grievances involving substantially the same facts and the same issue (mass grievance), or the Union has filed one or more grievances on behalf of two or more employees involving substantially the same facts and the same issue (mass grievance), the following numbers of grievants may attend:

1. three (3) grievants if the grievance involves more than one (1) but less than twenty (20) employees; and,
2. four (4) grievants if the grievance involves twenty (20) or more employees.

For a mass grievance, there will be one (1) meeting per work unit at Step 1, and only one (1) meeting at succeeding steps, and the numbers described above will control how many may attend.

F. *Steps*

Step 1:

The Grievance Form (Appendix A) must be filed with the employee's immediate supervisor or manager. A grievance will not be accepted unless filed within twenty-one (21) days after the incident which gave rise to the grievance or within twenty-one (21) days after the grievant became aware of the matter. The grievance will provide information concerning the nature of the grievance and a detailed statement of the specific remedy sought. The grievance will specify the article and section of the Agreement, provision of the statute or regulation or other conditions of employment allegedly violated. The parties may then request a meeting or agree that no meeting be held. If either party requests a meeting, it must take place within seven (7) days of the filing of the Grievance Form. The meeting will be with the immediate supervisor or designee and any other management representative the Employer deems necessary, and the grievant and/or the grievant's steward. A decision will be given to the aggrieved within fourteen (14) days following the filing of the written grievance.

Step 2:

A grievant may appeal the decision in Step 1. The appeal must be in writing and filed with the Division Director (or the appropriate Deputy Associate Chief Counsel in the case of International) within seven (7) days of receiving the decision in Step 1. The parties may request a meeting or agree that no meeting be held. If either party requests a meeting, it must take place within seven (7) days of the appeal. The

meeting will be with the person with whom the appeal was filed or designee and any other management representatives the Employer deems necessary, and the grievant and/or the grievant's union steward and/or the Chief Steward. A written decision will be given to the grievant within twenty-one (21) days of the filing of the appeal.

Step 3:

A grievant may appeal the decision in Step 2. The appeal must be in writing and filed with the appropriate Associate Chief Counsel (or Deputy Chief Counsel [Management and Operations] in the case of the Operational Division) within fourteen (14) days of receipt of the decision. The parties may request a meeting or agree that no meeting be held. If either party requests a meeting, it must take place within seven (7) days of the appeal. The meeting will be with the Associate Chief Counsel (or Deputy Chief Counsel [Management and Operations] in the case of the Operations Division) or designee and any other management representatives the Employer deems necessary and any or all of the following: the grievant, the grievant's union steward, the Chief Steward, the Chapter President or a national representative (if the offices of Chapter President and Chief Steward are held by one individual, this does not authorize an additional union steward at the meeting). The written decision will be given to the grievant within twenty-one (21) days of the appeal. This decision, at the option of the Employer, may be provided by certified mail, return receipt requested, or by hand delivery to the chapter president with a copy to the grievant.

Section 4: Right to and Notice of Arbitration

The Union may invoke arbitration. The Union, within twenty-one (21) days of receipt of the decision at Step 3, must notify the final decision maker and Director, Operations Division, of the appeal by certified mail, return receipt requested, or by hand delivery. Pending grievances involving the same issues must be assigned to the same arbitrator.

Section 5: Miscellaneous

A. The parties may agree in writing to waive any step of this article.

B. The parties may agree to extend time limits delineated in this article.

C. Time periods set forth in this article will begin the day after the receipt by the Employer of a grievance or appeal and the day after the receipt by the Union of a decision to the grievance or appeal. If the 1st day of any time period falls on a Saturday, Sunday or legal holiday in the District of Columbia, such time period will expire as of the close of business of the next business day.

D. Responses to grievances shall be served on the appropriate steward and the grievant. Time periods set forth in this article shall be computed from the day after the receipt of a grievance or appeal by the Employer and the day after the receipt of a response by the Union.

E. When replying in writing, the Employer will render a substantive response to each issue raised by the Union. Failure to issue a substantive response shall cause no adverse consequences to the Employer.

F. Grievance meeting will be scheduled at a time agreeable to the parties, during the grievant's normal tour of duty.

G. Failure by the grievant or the Union to prosecute the grievance or appeal (including the meeting of time deadlines) at any step of the article will nullify the grievance. Failure by the Employer to meet any of the time deadlines of the article respecting responses will permit the grievant or the Union to move to the next level of grievance or appeal.

H. The parties may not withhold evidence during the resolution of a grievance. Newly-discovered evidence may be introduced at any step of the proceeding prior to arbitration.

I. Unless agreed to by the parties, new issues may not be raised by either party unless they have been raised at Step 1 of the grievance procedure.

J. If the Employer raises an issue of grievability or arbitrability, the grievance will be amended to include a resolution of this issue in the processing of the grievance.

K. No grievances resolved below the level of Associate Chief Counsel will be precedential. Grievances resolved by the Associate Chief Counsel or above will be precedential unless the parties agree otherwise.

ARTICLE 6 ARBITRATION

Section 1

Matters not settled in the grievance procedure or that are otherwise appealable to arbitration will be arbitrated pursuant to the terms of this article.

Section 2

This arbitration procedure will be supported by a permanent panel of arbitrators.

Section 3 -

A. The Employer and the Union shall mutually select a panel of permanent arbitrators to decide all arbitration cases. Four individuals with federal sector (including equal employment opportunity) arbitration experience will be selected. If the parties cannot reach agreement as to the composition of the panel, each party will nominate five arbitrators and then each party shall strike three, thus leaving four arbitrators.

B. Either party may strike an arbitrator upon giving thirty (30) calendar days notice. In replacing arbitrators or otherwise filling vacancies, the parties will request three names from the Federal Mediation Conciliation Service (FMCS) for each vacancy. Each party may add two names to the list for each vacancy. They will then alternately strike names from each list until the requisite number of names remain to fill the vacancies. First strike will be determined by a flip of the coin.

C. Upon notification of striking, no additional cases will be assigned to that arbitrator. If an arbitrator has been assigned a case when a party

has striken him or her, the arbitrator shall retain full jurisdiction over that case to include conducting a hearing and rendering a decision.

Section 4

A. Arbitration will be invoked in accordance with the time deadlines (twenty-one (21) calendar days) specified elsewhere in this Agreement.

B. When invoking arbitration, the Union will serve a copy of the invocation on the Chief, Human Resources Branch.

C. Pending grievances involving the same issues must be assigned to the same arbitrator.

Section 5

A. The parties will each pay one half of the regular fees and expenses including travel expenses of the arbitrator hearing a case.

B. Arbitration hearings will be held on the Employer's premises, or at any site mutually agreed to by the parties.

C. The grievant, the grievant's representative, and all bargaining unit employees who are called as witnesses will be excused from duty to the extent necessary to participate in the arbitration proceedings without loss of pay or charge to annual leave.

D. The arbitrator will determine which of the witnesses called by a party may testify at the hearing, based upon a determination that such testimony is irrelevant or unduly repetitious.

E. Except in emergency situations, the arbitrator will not have the authority to keep the record open in order to hear testimony of additional

witnesses. Each party has the responsibility and obligation to produce its witnesses on the day of the hearing. For purposes of this article, "emergency" has the same definition it has in 5 USC 7106.

F. The arbitrator shall have the authority to make all arbitrability and/or grievability determinations. The arbitrator shall make grievability and/or arbitrability determinations before addressing the merits of the original grievance.

G. If the Employer declares a grievance nonarbitrable or nongrievable, the original grievance shall be considered amended to include the issue of nongrievability.

H. The arbitrator's decision shall be final, binding, and precedential, and the arbitrator shall possess the authority to make an aggrieved employee whole to the extent such remedy is not limited by law or the collective bargaining agreement, including the authority to award back pay, reinstatement, retroactive promotion where appropriate, and to issue an order to expunge the record of all references to a disciplinary, adverse, or unacceptable performance action, if appropriate.

I. Upon selection of the arbitrator in a particular case, the respective representatives for the parties will communicate with the arbitrator and each other in order to select a mutually agreeable date for the arbitration hearing. Such selection will be completed within fourteen (14) calendar days of invocation. The parties will schedule the hearing to be conducted as soon as practicable, but no later than ninety (90) calendar days after

selection of the arbitrator. Scheduling of a hearing is not tantamount to a waiver of any rights. Once that date has been established, any party that unilaterally requests that an arbitration hearing be postponed, delayed, and/or cancelled for whatever reason, which results in any fees being charged by the arbitrator and/or court reporter, shall pay any and all fees.

J. In any grievance where the parties mutually agree to postpone, delay, and/or cancel an arbitration hearing, the parties will equally share the cost of any fees being charged by the arbitrator and/or court reporter. Where one party has no objection to the request of the other party for postponement, delay, or cancellation of the arbitration hearing, it will not absolve the requesting party from paying all of the fees being charged.

K. In any grievance where the parties settle the matter before an arbitration hearing and there are fees being charged due to the cancellation of the hearing, both parties will equally share the cost of any fees being charged.

L. The strict rules of evidence are not applicable and the hearing shall be informal.

M. The parties have the right to present and cross examine witnesses, issue opening and closing statements, and submit posthearing briefs.

N. The arbitrator may exclude testimony or evidence which is determined to be irrelevant or unduly repetitious.

O. Testimony shall be under oath or affirmation.

P. The Employer and the Union agree that the jurisdiction and authority of the chosen arbi-

trator and opinions expressed will be confined exclusively to the interpretation of the express provision or provisions of this Agreement at issue between the parties. The arbitrator will have no authority to add to, substract from, alter, amend, or modify any provision of this Agreement, or impose on either the Employer or the Union any limitation or obligation not specifically provided for under the terms of this Agreement. The parties reserve the right to take exceptions to any award to the Federal Labor Relations Authority. Any award may not include the assessment of expenses against either party other than as agreed to in this Agreement.

Q. The arbitrator shall have the obligation of assuring that all necessary facts and considerations are brought before him or her by the representatives of the parties. This may include drawing an appropriate inference when either party fails to present facts or witnesses that the arbitrator deems necessary and relevant. However, nothing in this article entitles either party to discovery.

R. The Employer will make bargaining unit employees available as witnesses when requested by the Union. If the Employer determines it is not administratively practicable to comply with the Union's request, and the arbitrator determines the employee's testimony is relevant, then the hearing may be postponed. However, the Union may agree to submit an affidavit in place of the direct testimony of the employee.

S. Bargaining history may not be used in an arbitration hearing unless the party wishing to use it has notified the other in writing at least thirty (30) calendar days before the hearing of

its intent to use such testimony and/or affidavits. For purposes of this Agreement, the term "bargaining history" means solely the discussions of the provisions of this Agreement between the National Office of the Office of Chief Counsel, IRS, and NTEU Chapter 251.

T. Unless otherwise agreed, there will be a verbatim transcript of the hearing. A copy of the transcript will be provided to each party promptly after the conclusion of the hearing.

U. Arbitrators will be paid their normal fees, as provided by law.

Section 6

Where one party refuses to attend an arbitration, the arbitrator shall hold the hearing. The first issue to be addressed shall be the question of whether the case is properly before the arbitrator. If the case is proper, the grievance will be heard on the merits. Copies of any transcripts, briefs, and decision will be served on the other party. The party going forward will notify the other party of its intent, listing the date and location of the hearing.

Section 7

In any case where an arbitrator modifies an award pursuant to a request for reconsideration by the Office of Personnel Management, the parties will share equally the additional fees of such reconsideration. In cases where the Office of Personnel Management does not finally prevail, the Employer will assume full responsibility for the additional fees of the arbitrator.

APPENDIX E

25 FLRA No. 94

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. O-NG-1241

NATIONAL TREASURY EMPLOYEES UNION, UNION

and

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
REGION V, CHICAGO, ILLINOIS, AGENCY

DECISION AND ORDER ON
NEGOTIABILITY ISSUE

I. *Statement of the Case*

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). It concerns the negotiability of the following Union proposal:

> Excepted Service Employees
>
> The parties agree that the terms and conditions of this agreement, including the grievance procedure article, adverse action article, and arbitration article will apply to excepted service employees.

For the reasons discussed below, we find that the proposal is within the duty to bargain.[1]

II. *Background*

Most positions in the Federal civil service are in the competitive service or the excepted service. *See* 5 U.S.C. §§ 2102 and 2103.[2] Generally, the competitive service includes positions for which examinations are given. 5 U.S.C. § 3304. Some positions in the civil service are excepted from the competitive service and are placed in one of three "excepted service" schedules: (1) Schedule A, which includes positions other than those of a confidential or policy-determining character for which it is impractical to hold any examinations; (2) Schedule B, which includes positions other than those of a confidential or policy-determining character for which it is not practicable to hold a competitive examination; and (3) Schedule C, which includes positions of a confidential or policy-determining character. *See* 5 C.F.R. Part 213. Attorney positions in the civil service are included in Schedule A of the excepted service. 5 C.F.R. § 213.3102(d).

The proposal in this case seeks to include excepted service employees within the coverage of articles of the parties' collective bargaining agreement which apply to all other bargaining unit employees—Grievance Procedure, Adverse Action, and Actions Based on Unacceptable Performance. That is, under the

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[1] Because the record in this case is sufficient for us to decide the issue presented, we deny the Union's motion to present oral argument. *See* 5 C.F.R. § 2429.6.

[2] A third category, not relevant to the proposal in this case, is the Senior Executive Service. *See* 5 U.S.C. § 2101a.

proposal, the negotiated procedures that are followed when the Agency proposes to take disciplinary action against competitive service unit employees would also apply to excepted service unit employees. According to the Agency, and not disputed by the Union, the proposal would apply to 32 excepted service employees in Schedule A positions in the bargaining unit, most of whom are attorneys. Agency Statement of Position at n.1.

III. *Positions of the Parties*

A. *The Agency's Position*

The Agency contends that the proposal is nonnegotiable because "it interferes with areas otherwise provided for by federal law and will create inconsistencies with other statutory provisions." Agency Statement of Position at 2. The Agency, citing section 7106(a)(2) of the Statute, takes the position that "discipline of excepted service employees has been clearly established by Congress to be the sole prerogative of the federal employer and is subject neither to pretermination procedures nor to review at any level outside of the employing agency." Agency Statement of Position at 3.

Specifically, the Agency contends that the Civil Service Reform Act of 1978 (CSRA) establishes that excepted service employees are not entitled to the protections accorded to employees in the competitive service. According to the Agency, "it has been . . . understood that in return for ease of entrance into federal jobs, excepted service employees would serve, for most purposes, at the will of their federal employers without a formal discipline process and without administrative or judicial review." Agency State-

ment of Position at 7. The Agency states that while Congress limited the grounds on which an agency could take adverse actions against competitive service employees and preference eligible excepted service employees and gave those employees certain procedural rights of appeal to the Merit Systems Protection Board (MSPB), it did not provide any separate rights for non-preference eligible employees in the excepted service.[3] Thus, the Agency concludes, "Congress manifested its intent that federal excepted service employees serve as employees at will with no right of review by any outside source of disciplinary action against them." Agency Statement of Position at 10.

The Agency further argues that Congress' refusal in the CSRA to extend protections to non-preference eligible excepted service employees preempts an agency from granting grievance procedure rights to those employees through collective bargaining. The Agency states that although Congress authorized the Office of Personnel Management (OPM) to promulgate regulations granting procedural rights to non-preference eligible employees (*see* 5 U.S.C. § 7511(c)), OPM has not done so. The Agency also relies on *Department of Justice v. FLRA*, 709 F.2d 724 (D.C. Cir. 1983), where the court found nonnegotiable a proposal to bring probationary employees within the scope of the parties' negotiated grievance procedure. Finally, the Agency notes that in the 99th Congress legislation was introduced which would establish statutory procedural rights for excepted service employees who have completed two years of service, and argues that the fact that the legislation was intro-

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[3] "Preference eligible" employees generally include certain veterans and relatives. *See* 5 U.S.C. § 2108.

duced demonstrates that "Congress believes that the Congressional scheme embodied in the CSRA does not currently allow grievance and arbitration rights for excepted service employees." Agency Statement of Position at 14.

B. *The Union's Position*

The Union contends that the proposal is consistent with the Statute and is within the duty to bargain. The Union asserts that under sections 7121 and 7103 of the Statute, excepted service employees are "employees" and their complaints fall within the broad definition of the term "grievance." The Union notes that while Congress excluded certain employees and subject-matter grievances from coverage under the negotiated grievance procedures which must be included in collective bargaining agreements, it did not exclude excepted service employees or their grievances from coverage under the Statute.

The Union goes on to argue that in the absence of a conflicting Federal law or Government-wide regulation, the Agency's duty to negotiate is clear. According to the Union, to overcome the broad agency obligation to bargain over grievance and arbitration procedures under section 7121 of the Statute, an affirmative expression of congressional intent is needed in order to show that another law is in actual conflict with that mandate. Moreover, if two statutes pertain to the same subject matter, both must be given effect if possible. The Union argues that the statutes cited by the Agency do not conflict with section 7121, and in any event nothing "presupposes [that] the statutory exclusion of excepted service employees could not co-exist with the alternate grievance and arbitration procedures made available under the CSRA." Union Response at 8.

The Union disputes the Agency's analogy to the probationary employees involved in *Department of Justice*, noting that Congress affirmatively preserved an agency's right to summarily discharge a probationer but did not do so for excepted service employees. Citing various examples of procedural rights afforded by statute to employees in Schedule A positions, the Union states that Congress clearly intended these employees to be covered by protections in the CSRA. The Union states that its proposal would not undermine the scheme Congress envisioned when it excluded Schedule A employees from appealing certain actions to the MSPB. Finally, the Union argues that Schedule A employees have a constitutional right to due process, and the proposal in this case would give these employees notice and an opportunity to respond to charges against them.

IV. *Analysis*

Our analysis begins with the relevant language of the Statute. The Statute sets forth rights and obligations of Federal employees, agencies and labor organizations. As relevant to the proposal in this case, the term "employee" includes individuals employed in an agency, but does not include members of the uniformed services, supervisors or management officials, and certain other individuals. 5 U.S.C. § 7103(a)(2). An "agency" includes most Executive agencies as well as the Library of Congress and the Government Printing Office. 5 U.S.C. § 7103(a)(3). Under section 7102 of the Statute, each employee has the right to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under the Statute. 5 U.S.C. § 7102(2). Under section 7121 of the Statute,

collective bargaining agreements must provide procedures for the settlement of "grievances," a term which is broadly defined in section 7103(a)(9) to include complaints by "any employee." *See generally American Federation of Government Employees, Locals 225, 1504, and 3723 v. FLRA*, 712 F.2d 640 (D.C. Cir. 1983). Parties' collective bargaining agreements may exclude any matter from the application of the grievances procedure, and may not include the five subjects enumerated in section 7121(c). *AFGE Locals 225, 1504, and 3723*, 712 F.2d at 642.

The proposal in this case includes excepted service employees within the coverage of grievance, adverse action, and arbitration articles of the parties' negotiated agreement. As reflected in the statutory provisions discussed above, Congress did not exclude excepted employees from the definition of employee in the Statute, although it did exclude other employees. Nor did Congress provide that grievances of excepted service employees could not be covered under negotiated grievance procedures, although it did exempt five other subjects from the scope of the negotiated grievance procedure. Consequently, we find no indication in the language of the Statute that Congress intended to mandate the exclusion of employees from coverage of the negotiated grievance procedure based on their excepted service status.

Likewise, nothing in the legislative history of the Statute indicates that Congress intended to exclude excepted service employees from the benefits of negotiated grievance procedures available to other employees. To the contrary, the pertinent history of the Statute emphasizes that the permissible reach of the negotiated grievance procedure was to be broad. As the Conference Report to the Statute stated:

> All matters that under the provisions of law could be submitted to the grievance procedure shall in fact be within the scope of any grievance procedure negotiated by the parties unless the parties agree as part of the collective bargaining process that certain matters shall not be covered by the grievance procedures.

H.R. Conf. Rep. No. 1717, 95th Cong. 2d Sess 157, *reprinted in* 1978 U.S. Code Cong. and Admin. News 2860, 2891. This statement of the Conference Committee is consistent with the provisions of the Statute and reinforces our view that Congress did not intend to exclude excepted service employees by virtue of their status from coverage of the negotiated grievance procedures that it required to be part of every collective bargaining agreement under the Statute.

The Agency's contention that the proposal in this case is outside the duty to bargain relies primarily on provisions which exclude non-preference eligible excepted service employees from the MSPB appeal rights available to other employees. *See* 5 U.S.C. §§ 4303(e) and 7511(a)(1). As discussed above, the Agency also relies on the decision in *Department of Justice v. FLRA* and on the introduction of legislation granting statutory appeal rights to non-preference eligible excepted service employees. The Agency's contentions do not persuade us that Congress intended to disallow parties from bargaining over the proposal presented in this case.

The majority of excepted service positions are so deemed because, due to the nature of the job, it is impractical to examine for the position. *See* 5 C.F.R. Part 213. Although the methodology of appointment for excepted service employees differs from that for

employees in the competitive service, many of their terms and conditions of employment parallel those of their competitive service counterparts, including, for example, such matters as compensation, retirement and performance appraisal. Excepted service employees, whether or not they are preference eligibles, enjoy rights to external appeal that probationary employees do not. *See, for example,* 5 C.F.R. § 351.901 (right to appeal reduction in force to MSPB); 5 U.S.C. § 5335(c) (appeal of denials of periodic step increases).

As reflected in the legislative history of the Civil Service Reform Act, Congress preserved an employing agency's virtually unreviewable authority to determine whether to retain probationary employees.[4] However, Congress recognized a distinction between probationary employees and excepted service employees by extending certain statutory appeal rights to preference eligible excepted service employees, and by granting OPM authority to extend those protections by regulation to other classes of excepted service employees. *See* 5 U.S.C. § 7511. Conversely, preference eligible employees in the excepted service who have served less than a year are not extended any greater right of review of adverse personnel actions than their competitive service probationar counterparts. *Id.*

In other contexts Congress and the courts have recognized that excepted service employees enjoy some right of review of personnel actions. For example, Congress extended the coverage of the CSRA's prohibited personnel practices provisions to excepted serv-

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[4] *See* S. Rep. No. 969, 95th Cong., 2d Sess. 45, *reprinted in* 1978 U.S. Code Cong. and Admin. News 2767. *See also Department of Justice,* 709 F.2d at 730.

ice employees. 5 U.S.C. § 2302. Further, in the recent decision in *Fausto v. United States*, 783 F.2d 1020 (Fed. Cir. 1986), *petition for rehearing denied*, 791 F.2d 1554 (1986), the court found that a non-preference eligible excepted service employee could properly assert Tucker Act and Back Pay Act claims for damages before the Claims Court. While reaffirming that the CSRA provided no statutory appeal rights to such employees, the court nonetheless found that the comprehensive remedial scheme of the CSRA did not foreclose the enforcement of rights created under other regulatory and statutory provisions.

There is nothing in the record of this case, nor is it otherwise apparent, that Congress specifically intended to exclude excepted service employees from coverage under the various articles of a collective bargaining agreement.[5] Unlike the situation involving

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[5] We note that under the Statute as well as under the predecessor Executive Order program, excepted service employees have been included within at least some parties' negotiated grievance procedures. *See, for example, U.S. Soldiers' and Airmen's Home and American Federation of Government Employees, Local 3090, AFL-CIO*, 11 FLRA 692 (1983) and *National Labor Relations Board Union and the General Counsel of the National Labor Relations Board*, 5 FLRC 287 (1977). We also note that under the Statute the Federal Service Impasses Panel has considered, in resolving an impasse, whether bargaining unit attorneys who are not eligible for veterans' preference should be entitled to the same protections under the contract as competitive service employees. The Panel concluded that "attorneys should not be treated differently solely on the basis of their veteran or non-veteran status; they should have access to the grievance and arbitration procedures on the same basis as other members of the bargaining unit." *Federal Trade Commission, Boston, Massachusetts and Local 3656, American Federation of Government Employees, AFL-CIO*, 79 FSIP 65 (1980), slip op. at 5.

probationary employees, there is nothing that can be construed as an affirmative preservation of a unilateral management prerogative by Congress or as indicating any explicit congressional limitation on the extension of appeal rights to these employees through the collective bargaining process.[6] Also, there is no indication that by authorizing OPM to extend statutory appeal rights to excepted service employees, Congress intended to exclude them from access to contractual grievance procedures. Finally, we reject the Agency's contention that the introduction of legislation that would grant statutory appeal rights to nonpreference eligible excepted service employees demonstrates Congress' intent to preclude coverage under negotiated grievance procedures. The introduction of a bill to grant statutory rights to these employees, some of whom are in units of exclusive recognition and some of whom are not, does not reflect any intent to preclude bargaining under the Statute on the proposal before us.

Consequently, we find no inconsistency between this proposal and any law, rule or regulation so as to remove the proposal from the duty to bargain under the Statute. Absent an express affirmative statement by the Congress, we decline to read excepted service employees out of full coverage of the negotiated grievance procedure required by the Statute.[7]

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[6] In *Department of Justice*, the court relied on the provisions of 5 U.S.C. § 3321 establishing that a probationary period shall be served "before an appointment . . . becomes final." Another example of an express limitation of appeal rights may be found in the provisions precluding review of decisions involving excepted service employees who serve in Schedule C positions. *See* 5 U.S.C. § 7511(b)(2).

[7] In reaching our decision, we did not rely on the arbitration decision in *Department of Health and Human Services*

V. *Conclusion*

We find that this proposal is within the duty to bargain under section 7117(a)(1) of the Statute.

VI. *Order*

Pursuant to section 2424.10 of the Authority's Rules and Regulations, the Agency must upon request (or as otherwise agreed to by the parties) bargain concerning the Union's Proposal.[8]

Issued, Washington, D.C., February 27, 1987.

/s/ Jerry L. Calhoun
JERRY L. CALHOUN, Chairman

/s/ Henry B. Frazier, III
HENRY B. FRAZIER, III, Member

/s/ Jean McKee
JEAN MCKEE, Member

FEDERAL LABOR
RELATIONS AUTHORITY

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and National Treasury Employees Union, Chapter 224, FMCS No. 86K/12602 (Arb. Grether, July 28, 1986), submitted by the Union in support of its position after the parties filed their initial submissions.

[8] In deciding that the proposal is within the duty to bargain, we make no judgment as to its merits.

APPENDIX F

RELEVANT PORTIONS OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE AS AMENDED, 5 U.S.C. §§ 7101-7135 (1988); AND 5 U.S.C. §§ 4303 AND 7511-7513 (1988)

§ 7103. Definitions; application

(a) For the purpose of this chapter—

(1) "person" means an individual, labor organization, or agency;

(2) "employee" means an individual—

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include—

(i) an alien or noncitizen of the United States who occupies a position outside the United States;

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the United States International Development Cooperation Agency, the Department of Agriculture, or the Department of Commerce; or

(v) any person who participates in a strike in violation of section 7311 of this title;

(3) "agency" means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Veterans' Administration), the Library of Congress, and the Government Printing Office, but does not include—

(A) the General Accounting Office;
(B) the Federal Bureau of Investigation;
(C) the Central Intelligence Agency;
(D) the National Security Agency;
(E) the Tennessee Valley Authority;
(F) the Federal Labor Relations Authority; or
(G) the Federal Service Impasses Panel;

(4) "labor organization" means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include—

(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

(C) an organization sponsored by an agency; or

(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

(5) "dues" means dues, fees, and assessments;

(6) "Authority" means the Federal Labor Relations Authority described in section 7104(a) of this title;

(7) "Panel" means the Federal Service Impasses Panel described in section 7119(c) of this title;

(8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

(9) "grievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

(10) "supervisor" means an individual employed by an agency having authority in the

interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority;

(11) "management official" means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

(13) "confidential employee" means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

(15) "professional employee" means—

(A) an employee engaged in the performance of work—

(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance or routine mental, manual, mechanical, or physical activities);

(ii) requiring the consistent exercise of discretion and judgment in its performance;

(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A) (i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;

(16) "exclusive representative" means any labor organization which—

(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or

(B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit—

(i) on the basis of an election, or

(ii) on any basis other than an election, and continues to be so recognized in accordance with the provisions of this chapter;

(17) "firefighter" means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment; and

(18) "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

(b)(1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that—

(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

(B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

(2) The President may issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.

§ 7112. Determination of appropriate units for labor organization representation

(a)(1) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote

effective dealings with, and efficiency of the operations of the agency involved.

(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes—

(1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;

(2) a confidential employee;

(3) an employee engaged in personnel work in other than a purely clerical capacity;

(4) an employee engaged in administering the provisions of this chapter;

(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) any employee primarily engaged in anvestigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization—

(1) which represents other individuals to whom such provision applies; or

(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

§ 7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that—

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable

statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

§ 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authortiy may take such action and make such recommendations concerning the award as it consid-

ers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

5 U.S.C. 4303 provides:

§ 4303. Actions based on unacceptable performance

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

(A) 30 days' advance written notice of the proposed action which identifies—

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which—

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by

the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee—

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section

shall be removed from any agency record relating to the employee.

(e) Any employee who is a preference eligible or is in the competitive service and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of this title.

(f) This section does not apply to—

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title,

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

5 U.S.C. 7511 provides:

§ 7511. Definitions; application

(a) For the purpose of this subchapter—

(1) "employee" means—

(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; and

(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions;

(2) "suspension" has the meaning as set forth in section 7501(2) of this title;

(3) "grade" means a level of classification under a position classification system;

(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

(b) This subchapter does not apply to an employee—

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by—

(A) the Office of Personnel Management for a position that it has excepted from the competitive service; or

(B) the President or the head of an agency for a position which is excepted from the competitive service by statute.

(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office.

5 U.S.C. 7512 provides:

§ 7512. Actions covered

This subchapter applies to—

(1) a removal;
(2) a suspension for more than 14 days;
(3) a reduction in grade;
(4) a reduction in pay; and
(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1206 or 7521 of this title.

5 U.S.C. 7513 provides:

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

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